

1
2
3
4
5
6
7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
10

11 ANDRE LaSHAUN THOMPSON,
12 Plaintiff,
13 v.
14 OMARI, et al.,
15 Defendants.
16

No. 2:19-CV-02565-DMC-P

ORDER

17 Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to
18 42 U.S.C. § 1983. Before the Court is Plaintiff's motion for leave to amend. ECF No. 25.

19 This action currently proceeds on Plaintiff's first amended complaint. See ECF
20 No. 11. Plaintiff seeks leave to file a second amended complaint to "clear-up his claims so that
21 the court and the parties can understand them" and to properly identify Defendants. See ECF No.
22 25, pg. 7. Plaintiff also added two new claims—intentional infliction of emotional distress
23 ("IIED") and medical negligence. See ECF No. 26, pgs. 8-9. Plaintiff separately filed a "Second
24 Amended Prisoner Civil Rights Complaint." See ECF No. 26. Defendants oppose the motion.
25 ECF No. 29.¹

26
27 ¹ On April 29, 2022, this Court reminded Defendants that failure to file an opposition to a motion
28 may be deemed consent to the relief requested. See ECF No. 28. Despite this, Defendants did not file
their opposition until May 31, 2022, over four months after the pending motion was filed on January
6, 2022. See ECF No. 29. Nonetheless, the Court will consider Plaintiff's motion on the merits.

1 The Federal Rules of Civil Procedure provide that a party may amend his or her
2 pleading once as a matter of course within 21 days of serving the pleading or, if the pleading is
3 one to which a responsive pleading is required, within 21 days after service of the responsive
4 pleading, see Fed. R. Civ. P. 15(a)(1)(A), or within 21 days after service of a motion under Rule
5 12(b), (e), or (f) of the rules, whichever time is earlier, see Fed. R. Civ. P. 15(a)(1)(B). In all
6 other situations, a party's pleadings may only be amended upon leave of court or stipulation of all
7 the parties. See Fed. R. Civ. P. 15(a)(2).

8 Here, Plaintiff's motion has been filed beyond the permissive time to amend as of
9 right. Defendants answered the first amended complaint on October 18, 2021. See ECF No. 19.
10 Discovery has closed and the date with which to file dispositive motions has been set and is
11 approaching. See ECF No. 34. Therefore, Plaintiff requires leave of Court to amend.

12 In determining whether to grant leave to amend, a court is to consider five factors:
13 "(1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and
14 (5) whether the plaintiff has previously amended his complaint." Nunes v. Ashcroft, 375 F.3d
15 805, 808 (9th Cir. 2004). The factors are not weighed equally. "Futility of amendment can, by
16 itself, justify the denial of a motion for leave to amend"; however, undue delay alone "is
17 insufficient to justify denying a motion to amend." Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir.
18 1995); Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712-13 (9th Cir. 2001) (citation
19 and quotation marks omitted). "[I]t is the consideration of prejudice to the opposing party that
20 carries the greatest weight." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th
21 Cir. 2003). "Absent prejudice, or a strong showing of any of the remaining [] factors, there exists
22 a presumption under Rule 15(a) in favor of granting leave to amend." Id.

23 Considering the foregoing factors, the Court finds that leave to amend is not
24 warranted, as it would cause undue delay and be prejudicial to Defendants. Because discovery
25 has been closed and this matter is now ready for potential resolution on summary judgment,
26 amendment would only serve to frustrate a speedy resolution of the entire controversy. Also, as
27 discovery deadlines have already been extended twice, extending the dates yet again would
28 likewise delay any trial on the merits. Furthermore, allowing amendment on Plaintiff's newly

1 added claims would result in prejudice to Defendants in that an amended pleading would require
2 additional time and resources in investigating and defending Plaintiff's new claims. In essence, it
3 would require starting the whole case anew: the filing of a responsive pleading by Defendants and
4 reopening discovery so the Parties can engage in discovery, including re-deposing Plaintiff, on
5 the two new claims of IIED and negligence. Thus, the timing of the proposed new complaint
6 after discovery has closed represents undue delay and will work a significant prejudice on
7 Defendants who have expended significant time over the last three plus years litigating those
8 claims in the first amended complaint. Lastly, while this is Plaintiff's first time seeking
9 amendment, this is not Plaintiff's first amendment. Plaintiff amended his complaint in response to
10 this Court's screening order. On balance, amendment here is not justified.

11 Where a party files an amended complaint without the right to do so, it is properly
12 stricken by the court. See, e.g., Hardin v. Wal-Mart Stores, Inc., 813 F. Supp. 2d 1167, 1181
13 (E.D. Cal. 2011) (striking fourth amended complaint: "If an amended pleading cannot be made as
14 of right and is filed without leave of court or consent of the opposing party, the amended pleading
15 is a nullity and without legal effect."); Sexton v. Spirit Airlines, Inc., Case No. 2:21-cv-00898-
16 TLN-AC, 2022 WL 976914 (E.D. Cal. March 31, 2022) (striking amended complaint); Guthrie v.
17 Hurwitz, Case No. 1:18-cv-00282-AWI-BAM, 2018 WL 4005261, at *1 (E.D. Cal. Aug. 20,
18 2018) (striking amended complaint). Consequently, Plaintiff's second amended prisoner civil
19 rights complaint, ECF No. 26, will be stricken as improperly filed.

20 Accordingly, IT IS HEREBY ORDERED that Plaintiff's motion, ECF No. 25, for
21 leave to amend is denied. Plaintiff's filing at ECF No. 26 is stricken.

22
23 Dated: May 15, 2023

24 
25 DENNIS M. COTA
26 UNITED STATES MAGISTRATE JUDGE
27
28